



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Ameriko Maintenance Company

**File:** B-242303

**Date:** March 21, 1991

Chase C. Rhee for the protester.  
Jorge Haedo for Shifa Services, an interested party.  
Herbert F. Kelley, Jr., Esq., Department of the Army, for the agency.  
Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Protest challenging failure of invitation for bids (IFB) to indicate that the state where contract is to be performed levies an excise tax on contractors is denied where the IFB states that the contract price is to include all applicable taxes, thereby giving notice to all bidders that it is their burden to ascertain whether and to what extent any taxes apply and to include the appropriate amount in their bids.
2. Protest alleging that solicitation is defective because it fails to notify bidders that storage space furnished by the government is insufficient and that the contractor will have to provide additional storage space is denied where the protester bases its contention merely on its prior need for extra storage space as the incumbent contractor and fails to show that the solicitation does, in fact, place undue risk on bidders, in view of their opportunity to make site visits and the specific language in the solicitation advising them that the government cannot guarantee that all of the storage space will be available throughout the period of the contract.
3. Protest that the deduction percentages listed on the Performance Requirements Summary (PRS) should total 100 percent of the contract price is denied where the PRS properly does not list all the contract requirements for which defective performance may cause a reduction in the contract price. While there may be uncertainty regarding what deductions may be taken for the unlisted requirements, this uncertainty is not unreasonable since the requirements are not easily susceptible to being quantified and all bidders are competing equally.

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## DECISION

Ameriko Maintenance Company protests certain allegedly defective provisions in invitation for bids (IFB) No. DAKF57-91-B-0007, issued by the Department of the Army for custodial services at Madigan Army Medical Center, Fort Lewis, Washington. Bid opening, which was scheduled for December 12, 1990, has been postponed.

We deny the protest.

The solicitation contemplated the award of a firm, fixed-price contract for 1 base year and two 6-month option periods. The IFB called for the contractor to furnish all services and materials necessary to perform custodial services at the locations identified in the IFB. Two days before the scheduled bid opening date, the protester filed a protest with our Office charging that four<sup>1</sup>/ provisions in the solicitation are defective. The protester bases most of its challenges on knowledge it has gained as the incumbent contractor.

### STATE EXCISE TAX

Ameriko contends that the solicitation is defective because it does not specifically notify prospective bidders that the state of Washington imposes an excise tax. In this regard, the protester contends that absent an indication in the solicitation that the excise tax, which is rare because only three states impose it, does in fact exist in Washington, unsuspecting out-of-state bidders will fail to factor the tax into their bid prices and, therefore, the competition for the contract will be unfair. The Army disagrees, arguing that the solicitation is not defective because it included Federal Acquisition Regulation (FAR) § 52.229-3, entitled "Federal, State, and Local Taxes," which states that the contract price includes all applicable federal, state, and local taxes.

As the Army points out, the inclusion of this clause places the burden on the bidder to ascertain whether and to what extent any taxes apply in determining the amount of its bid. The Bruce Corp., B-231171, June 24, 1988, 88-1 CPD ¶ 610.

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<sup>1</sup>/ In its comments on the agency report, the protester withdrew one basis of protest regarding the wage determination provision; consequently, our consideration will be limited to the remaining three bases.

While nearly all of the states and numerous localities impose taxes, the applicability of state and local taxes varies among the states and from one locality to another; therefore, the burden is placed on bidders because they generally are more familiar with the application of state and local taxes than the contracting officer. Tumpane Servs. Corp., B-220465, Jan. 28, 1986, 86-1 CPD ¶ 95. Additionally, contracting agencies generally are not sufficiently familiar with the bidders' operations to arrive at definite conclusions concerning the applicability of taxes to the contract, and it would be inappropriate to impose on them the burden of examining the tax situation of each bidder who may elect to submit a bid. J&W Welding and Fabrication, B-209430, Jan. 25, 1983, 83-1 CPD ¶ 92.

Thus, while an agency is not precluded from identifying in a solicitation a particular tax that it believes will be applicable to the contractor, neither is it required to do so. The responsibility to determine the applicability of local taxes simply is that of the bidder, not the government.

#### STORAGE SPACE

Ameriko argues that the solicitation is defective because it fails to reveal the need for storage space exceeding the 1,000 square feet that the IFB states will be made available for the contractor. In this regard, the protester states that 1,000 square feet is not large enough for use as the contractor's administrative and storage space and that, as the incumbent contractor, it had to rent a trailer for use as additional storage space. Based on its experience, the protester charges that the solicitation should inform all bidders that they bear the responsibility to pay for additional storage space.

As a general rule, a procuring agency must give sufficiently detailed information in an IFB to enable bidders to compete intelligently and on a relatively equal basis. T&A Painting, Inc., B-229655.2, May 4, 1988, 88-1 CPD ¶ 435. However, there is no legal requirement that an IFB be so detailed as to completely eliminate all performance uncertainties and risks. Hero, Inc., 63 Comp. Gen. 117 (1983), 83-2 CPD ¶ 687; Ameriko Maintenance Co., B-230994, July 22, 1988, 88-2 CPD ¶ 73.

The Army insists that placing the risk on potential bidders that additional storage space will be needed is reasonable under the circumstances here. To support this contention, the Army states that while the solicitation indicates that the

government has designated approximately 1,000 square feet and closet-type housekeeping storage rooms for the contractor's use as administrative and storage space, the solicitation also states in the same provision that the government cannot guarantee the continued use of such rooms and will not reimburse the contractor for the loss of such rooms.

We find that the solicitation does not place unreasonable risk upon the prospective bidders with regard to administrative and storage space. To the extent that Ameriko suggests otherwise, the fact that the protester rented a trailer, as the incumbent contractor, does not by itself establish that the contemplated government-furnished storage space is insufficient; rather, it merely shows that the space was insufficient for Ameriko. Obviously, what may be adequate for one contractor may be inadequate for another, given the fact that contractors may use different equipment and employ different practices regarding the storage of supplies. To the extent that there may be risk that the furnished space is insufficient, prospective bidders are or should be aware of that fact here, since the solicitation specifically advised bidders that they may not be able to use the designated storage rooms and the agency conducted a group site visit and a pre-bid conference where bidders were given the opportunity to see the facilities and to formulate opinions regarding the premises, including the adequacy of storage space.

#### DEDUCTION PERCENTAGES

The protester contends that the solicitation is defective because the deductions for the task categories in the solicitation's Performance Requirements Summary (PRS) do not total 100 percent of the contract price. In this regard, the protester maintains that the solicitation must list all tasks that--if unsatisfactorily performed--warrant deduction of the contract price with their corresponding deduction percentages.

The PRS lists the standards that the agency will use to measure contractor performance. The PRS also explains the quality assurance methods that the agency will use to evaluate the contractor's performance in meeting the contract requirements and defines the procedure the agency will use to reduce the contractor's monthly payment if satisfactory performance is not rendered by the contractor. The PRS lists the hospital areas that will be inspected including, for example, patient care clinics; patient care areas; dental clinics; administrative areas; ramps, hallways, and corridors;

and infectious waste pickup areas. The PRS also advises bidders that there are services which are not included on the PRS and to the extent the contractor performs them unsatisfactorily, the government's quality assurance actions and remedies will be in accordance with FAR § 52.246-4, entitled "Inspection of Services-Fixed Price," which was incorporated into the solicitation. According to the agency, it must resort to FAR § 52.246-4 when it determines that there is defective performance of the following requirements: (1) implementation of a quality control plan; (2) stabilization of critical area employees; and (3) development and maintenance of, including updating, the various custodial publications required under the solicitation.

The agency contends that since it may resort to FAR § 52.246-4--which provides that the government may reduce the contract price to reflect the reduced value of the services when defects cannot be corrected by reperformance--when there is defective performance of the requirements that were not listed on the PRS, it would be inappropriate for the deduction percentages of the tasks listed to equal 100 percent.


Unlike the tasks that were listed on the PRS with specificity--delineating each hospital area that would be inspected, the standards by which they would be inspected, the maximum allowable degree of deviation from the requirement, and the method of surveillance--the contract requirements which were not listed cover general tasks that are incidental to the successful performance of the custodial contract. As such, these general requirements are not easily susceptible of being quantified with regard to respective percentage deductions for defective performance, given the nature of the contract and its more quantifiable tasks. Since all the bidders are aware of the requirements and the agency's inspection rights and remedies, Ameriko and other potential bidders are not prejudiced by the omission of their deduction percentages. To the extent that some uncertainty exists among the bidders with regard to the amount that may be deducted for defective performance of these requirements,<sup>2/</sup> the existence of uncertainty among bidders does not by itself constitute an unreasonable risk here--where it is manifestly

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<sup>2/</sup> To the extent the contractor disagrees with the amount actually deducted from its contract price, it may challenge the alleged improper deduction under the Disputes clause of the contract. Ameriko Maintenance Co., B-224087, Dec. 19, 1986, 86-2 CPD ¶ 686.

impossible to assign deduction percentages to these requirements. See Hero, Inc., 63 Comp. Gen. 117, supra. Consequently, such risk must be formulated into their bid prices. Given our finding that the solicitation reasonably omitted deduction percentages for these general, unquantifiable contract requirements, notwithstanding the agency's right under FAR § 52.246-4 to reduce the total contract price due to defective performance, we conclude that it would have been inappropriate for the deductions listed to total 100 percent of the contract price.

The protest is denied.

  
for James F. Hinchman  
General Counsel